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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1659

EDWARD BRITT WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case was published March 31, 1971, and is reported in ..... F.2d ..... It is captioned *United States of America,* Appellee v. *Edward Britt Wilson,* Appellant. A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit sought to be reviewed here is not published in the official reporter as yet. It is entitled *United States of America* v. *Edward Britt Wilson*, and is dated March 31, 1971. The court below entered an order staying its mandate for a period of 30 days from March 31, 1971, to and including April 30, 1971, pending the filing and ultimate disposition of this petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and under and by virtue of Title 18, U.S.C. 3772, within the time provided for in Rule XI and Rule 22(2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been but should be settled by this Court. It has decided an important and significant question of Constitutional law contrary to the decisions of this Court and has refused to follow the precedents of this Court on that Constitutional issue. The decision of the Fifth Circuit Court of Appeals in this case on substantial issues is contrary to decisions of other cases decided by the Fifth Circuit. In its rulings, the Court has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision to correct the errors inherent in its decision.

(c)

QUESTION PRESENTED

May a parked and locked automobile be searched by federal officers, having probable cause for the search, but without a search warrant and not incident to an arrest, consistent with the mandates of the Fourth Amendment to the Constitution of the United States.

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26, Section 5205(a)(2), United States Code:

> "No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. . ."

Title 26, Section 5604(a)(1), United States Code:

> "Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

(e)

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Northern District of Georgia, charged with possession of nontaxpaid distilled spirits. A pretrial motion to suppress evidence was overruled. The trial resulted in a judgment of conviction and a sentence of three years' imprisonment and a $5,000 fine "to stand committed for payment of said fine." The conviction was summarily affirmed on appeal to the Fifth Circuit Court of Appeals.

The facts disclosed by the evidence that the nontaxpaid distilled spirits involved in the prosecution were contained in a 1963 Pontiac automobile which was parked on a lot behind a tavern in Atlanta, Georgia. The vehicle was locked and the driver had gone into the tavern and thereafter departed from the premises with Petitioner, who had followed him into the parking lot in another vehicle. There were seven officers in the immediate area, all of whom were participating in the investigation and were in actual or radio contact with each other.

Two of the officers went to the site of the parked, locked Pontiac and investigated it. After smelling the odor of nontaxpaid distilled spirits around the trunk of the vehicle, they searched the same by forcing a tool under the trunk lid so as to raise the lid sufficiently to permit them to shine a flashlight into the trunk. They observed gallon plastic jugs in the trunk. Following this, the officers broke into the body of the locked vehicle where they found an additional quantity of distilled spirits. We have not recited all of the evidence relating to probable cause, for the reason that it is conceded that those facts, together with the fact that the officer smelled the odor of distilled spirits before he searched the vehicle by forcing the trunk lid,

supplied him with sufficient probable cause to reasonably believe that the vehicle contained illicit distilled spirits.

After the vehicle was searched, by use of his radio, the searching officer contacted other officers who were participating in the investigation. They arrested Petitioner and the driver, who were an undisclosed distance down the street. The identity of both of these parties was already known to the officers and there is no evidence or suggestion that they were attempting to escape.

REASONS FOR GRANTING THE WRIT

The decision of the court below has decided, without opinion, an important question of Constitutional law in a manner contrary to the decisions of this Court. While the precise factual situation has not been presented to this Court, the decision below is inconsistent with the teachings of *Preston* v. *United States*, 376 U.S. 364, and *Chambers* v. *Maroney*, ... U.S. ....., 90 S.Ct. 1975. More than this, the decision is contrary to other decisions of the Fifth Circuit Court of Appeals referred to below.

The search took place when the officers forced the trunk lid and thereafter broke into the vehicle. The arrests were made after the search and at a place remote from it; thus, the search was not incident to the arrests.

The recognized principle that, assuming the existence of probable cause, "automobiles and other vehicles may be searched and without warrants 'where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought' ", *Chimel* v. *California*, 395 U.S. 752, fn. 9, page 763, does not obtain here for the simple reason that the test it recites is not met. There was no grave emergency, indeed, no reason at all why the officers should not have complied with the mandate of the Constitution. The

right of privacy is deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. *McDonald* v. *United States*, 335 U.S. 451, 455. The burden of establishing facts which would justify a warrantless search was upon the Government. Even *Carroll* v. *United States*, 267 U.S. 132, which created the exception relating to the search of moving vehicles, admonished that, "where the securing of a warrant (to search a vehicle) is reasonably practicable, it must be used." (267 U.S. 132, 156).

The cases decided subsequent to *Preston* v. *United States*, 376 U.S. 364, which either follow its teaching or distinguish it, see for instance *United States* v. *Nikrasch*, 7 Cir., 267 F.2d 740; *Barnett* v. *United States*, 5 Cir., 384 F.2d 848; *United States* v. *Harvey*, 7 Cir., 397 F.2d 526; and *Ranson* v. *Cupp*, 9 Cir., 423 F.2d 248, are not apposite for the reason that they all involved an arrest and subsequent search of a vehicle at a place remote from the place of arrest at a time when the vehicle was in actual custody. For a discussion of a number of those cases, see *Barnett* v. *United States*, supra. However, they are enlightening in the present situation. Reference to them might be helpful to the Court.

In overruling the motion to suppress evidence, the trial court relied upon *Chambers* v. *Maroney*, ... U.S. ....., 90 S.Ct. 1975. That case is readily distinguishable from the decisions of the Appellate Courts and the Supreme Court cited herein. That case involved a search by local police and was before the Supreme Court on certiorari in a habeas corpus proceeding. It concerned the admissibility of evidence seized from an automobile in which Chambers was riding at the time of his arrest. Following the arrest, the vehicle was taken to a police station and thoroughly searched without a warrant. The

Supreme Court held such search to be consistent with the Fourth Amendment.

Here, as in *Chambers*, the search was not an incident to the arrest, since Petitioner was not arrested until after the search took place. He was arrested at a locality remote from the place of the search. However, in *Chambers* the "vehicle could have been searched on the spot where it was stopped since there was probable cause to search *and it was a fleeting target for a search.*" Such facts do not obtain in the present case. The *Chambers* arrest involved the stopping of an occupied vehicle and the arrest of its occupants at a time when it was readily mobile. The primary question presented there was whether the officers, who would concededly have been authorized to search the vehicle on the spot without a warrant were justified in removing it to the police station before effecting the warrantless search. In terms of "lesser" and "greater" intrusions, the Supreme Court merely held that, under the given facts, given probable cause to search, it was not unreasonable to remove the vehicle to the police station to effect the search. It was a question, in final analysis, of convenience; the right to search having been established by the prior arrest and the fugitive nature of the vehicle.

In the present case neither of these supportive elements are present. There was no prior arrest and there was an already immobilized, not fleeting, vehicle. Absent these elements an entirely different factual and legal situation is presented. The trial court overlooked these significant distinctions. It is noteworthy, in weighing and applying these two very pertinent elements, that *Chambers* did not overrule *Preston* v. *United States*, supra.

The facts in *Rent* v. *United States*, 5 Cir., 209 F.2d 893, differ to some extent from those present here in that the vehicle was searched after it had been taken into "pro-

tective" custody by the officers. This distinction, however, is in form and not of substance, for the officer testified that he would not have permitted Petitioner's vehicle to be moved. In *Rent*, after quoting from one of its earlier cases, the Fifth Circuit said:

> "As authority for that statement, this Court cited the case of *Carroll* v. *United States*, 267 U.S. 132, and in that case the Supreme Court recognized,
>
> > 'a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' *Carroll* v. *United States*, 267 U.S. at page 153.
>
> "The reason for the difference does not exist in this case. The automobile was at rest, was actually in the custody of the officers, locked, and not likely to be disturbed."

After discussing the above, the general rules relative to the necessity for a warrant and to the application of the principle of practicability of procuring a warrant, the Court of Appeals, in *Rent*, at page 899 of the Reporter, continued:

> "We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take the decision in his own hands. The officer had ample opportunity to apply for a search warrant and in our opinion a search of the automobile without a warrant was not justified."

The search in the present case took place when the officers forced the lid to the trunk so as to observe its contents. Conceding that probable cause existed for the search and/or seizure of the vehicle, under the circumstances present here, as in *Rent,* the facts should have been presented to a magistrate. The automobile was at rest; it was locked, and not likely to be disturbed. We think it without significance that the vehicle was not in actual custody at the time of the search. It was, for present purposes, not subject to be removed from its location or from the presence of the officers.

In *Williams* v. *United States,* 5 Cir., 382 F.2d 48, it was held that even where probable cause for a search existed, a warrantless search of a vehicle is forbidden unless made incident to a lawful arrest or justified by exceptional circumstances, such as a *significant possibility of removal* or destruction of the object of the search. Had someone attempted to remove the vehicle, perhaps such exceptional circumstances would have existed and at that time the officers would have been justified in making an arrest and/or a search.

The test applicable here does not justify the search. As was said by the Fifth Circuit in *United States* v. *Adams,* 5 Cir., 424 F.2d 175:

> "The search was not necessary to protect the officers, no emergency existed, nor was there danger that evidence might be lost, or that the vehicle might be removed. Accordingly, we conclude that the evidence obtained through and as a result of the search . . . was not admissable."

In summary, Petitioner's Pontiac was parked and locked. The suspects were not under arrest and, while in the vicinity, were at a place remote from the vehicle. There were seven officers in the vicinity, two of whom were in the presence of the vehicle and all of whom were

in radio contact. A number of Commissioners, Judges and Magistrates authorized by law to issue search warrants were local. There was no possibility that the vehicle would be moved. No justification for the seizure of the vehicle without a warrant or for its search without a warrant was shown by the United States. Accordingly, the search and seizure were unlawful and the evidence obtained thereby should have been suppressed.

CONCLUSION

For the reasons submitted, it is respectfully urged that this Petition for the writ of certiorari should be granted and that this Court should determine that the Court below erred in affirming the judgment of the trial Court.

Respectfully submitted,

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Attorney for Appellant

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Georgia 30501

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Edward Britt Wilson were deposited in the United States Post Office with airmail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington, D. C. and to The Honorable John W. Stokes, Jr., United States Attorney, P. O. Box 912, Atlanta, Georgia.

This the 28th day of April, 1971.

ROBERT B. THOMPSON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30926

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD BRITT WILSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(March 31, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 30926
Summary Calendar

D. C. Docket No. CR A-26286

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDWARD BRITT WILSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 31, 1971

Issued As Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1659

EDWARD BRITT WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of possession of whiskey on which the tax had not been paid, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). He was sentenced to three years' imprisonment and fined $5000. The court of appeals affirmed without opinion (Pet. App. A1-A2).

1. The evidence at the hearing on the motion to suppress showed that, based on information from other

officers, federal agents of the Alcohol, Tobacco and Firearms Division, Atlanta, Georgia, had commenced surveillance of a parking lot suspected of being a transfer point for illegal whiskey. (App. 13-14).[1] Such transfers were effected by driving a loaded car to the parking lot, where it was left; within a short time, a man would arrive and drive the loaded car away. Later the car would be returned empty and left for the original driver. (App. 16-17). An agent had previously observed what appeared to be the latter part of such a transfer involving the car here in question—*i.e.*, the unloaded car being driven from the lot (App. 10). A check of the license number revealed that the license tag belonged to a different vehicle (App. 10-11).

On September 11, 1969, about 7:00 p.m., two federal agents observed the same car being driven into the parking lot by petitioner's co-defendant, followed by petitioner in another car. The first car appeared to be heavily loaded and the windows were covered by hanging clothing. After parking the cars, the two men entered a nearby tavern; they then returned to the second car and drove off, leaving the loaded car unattended (App. 9-11).

The two agents approached the car that was left behind and observed that it had heavy-duty springs and shock absorbers. After smelling an odor of "moonshine" whiskey coming from the trunk, the agents pried open the trunk lid and observed numerous plastic jugs. They then searched the rest of the

[1] "App." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

car and found a large number of plastic jugs of non-tax-paid whiskey (App. 11-12). They alerted other officers by radio, and petitioner and his companion were arrested (App. 12).

2. Petitioner concedes that the agents had probable cause to believe that the unattended automobile contained illicit distilled spirits. (Pet. 4-5). His sole contention is that the search of the car without a warrant was unreasonable under the circumstances.

The trial court correctly held, however, that this case is controlled by this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42. Although the car here was locked and unoccupied, it was in no sense immobilized. Petitioner and the driver were in the area with the keys to the car, capable of returning and driving it away. Moreover, in view of the normal practice for effecting transfers of illegal whiskey, it could reasonably be assumed that at least one other person might appear at any moment to drive the car away. Since the agents could not know when the car might be removed from the parking lot, it was not improper for them to conduct an immediate search rather than delaying the search until they could obtain a warrant.

Nor would it have been reasonably practicable under these circumstances for one of the two agents to leave the scene at 7:30 p.m. in order to locate a magistrate and obtain a search warrant. The choice of immediate search, or of seizure to prevent the car's removal, would still have confronted the remaining agent. See *Husty* v. *United States*, 282 U.S. 694. Consequently, the decision by the agents here was

entirely proper and did not offend petitioner's Fourth Amendment rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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